No. 16,649

IN THE

United States
Court of Appeals

For the Ninth Circuit

MILDRED MURPHY,
Plaintiff and Respondent,

-vs-

SAFEWAY STORES, INC.,
Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S REPLY BRIEF

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a) Plaintiff's Challenges to Appellant's Statement of the Case.

Plaintiff challenges appellant's statement of the case on two grounds:

First, she states that the defendant is incorrect in stating at page 2 of the brief that the plaintiff put in the evidence of her case in chief in the belief that res ipsa loquitur was relevant. It is not the appellant but the plaintiff who is incorrect. She has apparently overlooked her statements to the court at pages 182 and 183 of the printed Transcript and her oral argument to the trial court in opposition to defendant's Motion for Directed Verdict made at the close of her case in chief. Such argument was included in the typewritten Tran-

script of Evidence, (Page 222, Line 15 to Page 225, Line 20) in the Record on Appeal (Tr. 409) but was not specified for printing by either party and is therefore affixed hereto in relevant part as Exhibit "A" for the convenience of the court. Not only was res ipsa loquitur urged as being relevant, but two of the cases (*Chase -vs- Parry* (Okl. 1958) 326 P. (2d) 809 and *Baker -vs- Mannings, Inc.*, 122 CA (2d) 390, 265 P. (2d) 96 (1953) upon which plaintiff now heavily relies were then characterized as applying that doctrine.

Secondly, plaintiff challenges appellant's statement (Def. Br. 2) that the *Cagle* doctrine specified by the trial court as the "law of the case" represents one side of a split of authorities in California's intermediary appellate courts. She makes no criticism or attack upon appellant's careful analysis of the *Cagle* and *Vaughn* cases at pages 43 - 51 of its initial brief. The *Cagle* case was from California's Fourth District Court of Appeals and the *Vaughn* case from California's Second District Court of Appeal. It isn't apparent how the conflict itself can be seriously questioned. Perhaps it is the plaintiff's contention that the *Cagle* doctrine represents the California rule as opposed to the *Vaughn* case. But that is not so. Except for the fact that the *Vaughn* case is supported by the majority rule elsewhere, and should be controlling here, neither intermediate appellate court decision would be more persuasive than the other to a Federal Court sitting *in California*, and, a fortiori, neither should be relied upon by a Federal Court in Montana as representing anything more than what appellant characterized it—i.e., one side of a split of inferior courts in California:

"This (federal) court is no more bound to follow a decision of a District Court of Appeal (in California) than is the court of last resort of the state. (California) Our position here, in a case where the point at issue has not been decided by the highest California court. (citing *Erie -vs- Tomkins*) is that we have been substituted for the California Supreme Court as the appropriate court of appeal, and that it is our duty to apply the California law as the Supreme Court of the state would apply it on appeal there. (citation) In the performance of that function we may regard the decision of an intermediate appellate court as persuasive, but it is not controlling." (parenthetical inserts added)

Six Companies -vs- Joint Highway Dist. No. 13, (CA 9th, 1940) 110 F. (2d) 620, 626.

Certainly if a Federal Court in California would view each of these District Court of Appeals authorities as persuasive but not controlling, a Federal Court in Montana is not in a position to accord greater weight to such intermediate court.

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b) Plaintiff's Response to Appellant's First and Second Specifications of Error.

Plaintiff has refused to meet the import of appellant's First and Second Specifications of Error! She commences her response thereto at page 3 of her brief by saying that "appellant seeks by this (first) specification to put the trial court in error for giving instructions to which appellant made no objection. This it may not do", citing Federal Rule 51. That analysis of appellant's position is patently not true and wholly fails to meet appellant's fair challenges of error! There is nothing in appellant's brief that suggests error in the two instructions in question. In fact a whole section of it (pp. 17-21)

is devoted to showing their accuracy under Montana law and the general rule elsewhere. Plaintiff implies that the instructions may somehow have been erroneous (Pl. Br. 4) but that irrespective of such error they became the law of the case. But she in no-wise indicates what the error was or what defendant's objection should have been.

Appellant submits that its first two Specifications of Error are clear enough. They do not challenge the giving of erroneous instructions. They simply make the challenge that the trial court erred at the time of rendering final judgment in abandoning the true law of the case and the *Erie* mandate and overruling defendant's pending motions by applying the standard of an unauthorized minority rule.

Such specified error is embodied in the trial court's final judgment and this appeal was properly perfected therefrom. Rule 51 has no applicability! No error has been waived or is beyond challenge. The specifications are succinct and clear and if plaintiff has a response in support of the trial court's position, the errors should be fairly met for this appellate court by pertinent argument and authorities.

But plaintiff has refused to recognize or meet the issues of law so specified. It is not a sufficient answer to say that the questioning of such error is foreclosed under Federal Rule 51. Nor does it appear that the challenges are met by baldly stating that because some unspecified objection was not made at some unspecified time, the impact of *Erie -vs- Tompkins* and the Rules of Decision Act need not be considered. (Pl. Br. 7) It is not an answer to state without citation that by noting the

Nicola case on her tendered instruction No. 8, the defendant was somehow thereby put on notice that the mandate of *Erie -vs- Tompkins* was being abandoned—especially when no attempt is made anywhere in her brief to challenge or contest appellant's analysis of the actual *Nicola* ruling (Def. Br. p. 43, 44) or the complete consistency of Instruction No. 8 with applicable and controlling Montana law. (Def. Br. 17, 18) Certainly the mere notation on a sound statement of Montana and general law of an authority also supporting the same is not the predicate for an objection to such instruction.

But plaintiff's brief contains no other response to the first two Specifications of Error except a serious misstatement at page 7 which must be corrected. Leading up to that and by way of preface to a study of Defendant's Instruction 12 and its amendment, plaintiff stated at page 6 of her brief that the appellant's position throughout its brief is that the appellee had to prove that the defendant was negligent in the selection and application of the floor dressing. No fair study of appellant's brief supports that statement, and it wholly ignores the special section of the brief at the bottom of page 42 and page 43 distinguishing that body of law as being as far out of line in one direction with the majority rule as the *Cagle* doctrine is out of line in the other. Also it ignores the declaration appearing again and again through appellant's brief that what plaintiff was obligated to prove as a condition precedent to the establishment of a prima facie case, and what she wholly failed so to prove, was the existence of a dangerously slippery floor condition at the time and place of the accident.

But irrespective of such clear propositions in appellant's brief, the respondent made the foregoing statement and then followed it at page 7 with a purported quotation of defendant's tendered instruction both before and after amendment. Such quotation is incorrect, misleading and highly prejudicial. Plaintiff there states that as tendered, Defendant's Instruction 12 read:

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them."

But there is certainly no more fundamental issue in this case than that the plaintiff is plainly mistaken as to what the instruction as tendered actually was and what the amendment was! The point was very carefully and accurately covered at page 20 of appellant's brief which should be compared with the quotation at page 7 of plaintiff's brief and pages 13 and 399 of the printed Transcript. It will then be seen that the instruction as tendered closed with the phrase shown below in italics:

> "A store owner, such as Safeway in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, *so that thereafter the floor is not reasonably safe for its intended use by the customers in the store.*"

And the only amendment was the addition before the italicized portion of the phrase "or the creation of a dangerously slippery condition." The significance under Montana

law of the instruction before and after amendment is considered in detail at pages 19-22 of Appellant's Brief to which plaintiff makes no challenge. And see also in those regards the recent case of *De La Croix -vs- Sanders,* ..... Ore....., 347 P. (2d) 966 (1959). It is therefore certainly important that the misstatement at page 7 of plaintiff's brief as to the extent of the amendment be clearly appreciated.

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c) Weight to Be Given California Cases.

Finally at page 8 of her Brief the plaintiff suggests without citation of authority that the Montana Supreme Court would determine and apply California law rather than the majority rule or the rule of the weight of authority across the country as it is variously described. That statement ignores without argument or citation appellant's argument and citations on the point at pages 13 and 14 of its brief and the additional case of *Robinson -vs- F. W. Woolworth Co.,* 83 Mont. 431, 261 Pac. 253 (1927) citing and applying the general rule. It also assumes that the California rule is that of *Cagle* rather than *Vaughn* contrary to the careful study of the cases made at pages 43 - 50 of appellant's brief. And it completely ignores the rule of *Six Companies -vs- Joint Highway Dist.* No. 13, (CA 9th, 1940) 110 F. (2d) 620, 626, supra page 3, to the effect that a Federal Court in California and *a fortiori* in Montana is not bound by any intermediate California Court decision.

d) Specification of Error III.

The plaintiff makes no contest of defendant's definition of the majority rule commencing at page 23 of its brief or of defendant's analysis of the conflicting minority rule of *Nicola* et al commencing at page 43. And so plaintiff "hangs her hat" on the propriety of the trial court's adopting such minority rule as the standard against which the sufficiency of the evidence is to be tested. Pl. Br. 8, 9) Plaintiff is thus making her response to the third specification of error wholly dependent upon how the appellate court rules on the first two specifications of error.

There are, however, certain portions of plaintiff's argument in this portion of her brief to which defendant would like to respond in shot-gun fashion:

While plaintiff heavily relies upon the potential characterization of janitor Rodoni's system of waxing as negligent, she does not make any argument or cite any authority as to how such courtroom demonstration proves or tends to prove the existence of a dangerously slippery condition *at the time and place of the accident*. Nor is the remarkable safety record established by that very system in anywise controverted.

Plaintiff relies on the *Allen -vs- Matson Navigation* case (Pl. Br. 12) as authority for the proposition that from the accident itself a jury could infer the existence of a dangerously slippery condition. The case does not so hold and the trial court here was careful to limit the case in precisely the same way that the Hon. Judge Pope who wrote the opinion limited it. Thus the *Allen* case is authority that from a fall a jury could infer that it was

one of slipping rather than tripping. And the trial court here carefully limited the holding to that point.

> "Likewise in this case, while the mere fact that Miss Murphy fell would be no evidence of why she fell, the manner in which she fell has considerable significance, and indicates that hers was a slipping fall."
>
> (Tr. 16, 17)

But the plaintiff states that from the manner of plaintiff's fall an inference of the existence of a dangerously slippery floor condition can be made. No authority can be cited for that proposition! Plaintiff is seeking to prove the existence of a dangerously slippery condition from the happening of the accident itself. It is an assertion that res ipsa loquitur is applicable and flies in the face of settled law across the entire country!

> 63 A. L. R. (2d), 635, Annotation, "Slippery Floor—Injury" section 11.

At page 13 of her brief plaintiff apparently challenges appellant's statements at pages 28 - 35 of its brief that there was not a single shred of evidence anywhere in the record that any wax whatsoever had built up anywhere in the store when Miss Murphy fell and more particularly that any had built up at the time and place of her fall, and that plaintiff didn't fall in some little-traveled or unusual spot. Appellant respectfully re-asserts its basic contention on those points and that there was absolutely no proof whatsoever of the existence of a dangerously slippery floor condition! Aside from plaintiff's description of the floor as very shiny and the happening of the accident itself which, of course, are no proof whatsoever,

the record contains only eye witnesses' testimony wholly rebutting the alleged slippery condition. Appellant stands on its statements of what the record contains and submits the controversy to the court.

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e) Plaintiff's Additional Authorities Distinguished

In addition to the authorities cited by the trial court and analysed and considered in appellant's opening brief, the plaintiff cites the following cases which appellant submits follow the general rule and are not authority for the *Cagle* et al ruling.

Western Union -vs- Blakely, 162 Miss. 859, 140 So. 336 (1932)

(Not a waxing case. Conflict of fact as to whether floor was wet and dangerously slippery from recent mopping.)

Moore -vs- Great Atlantic & Pacific Tea Co., 230 Mo. App. 495, 92 S.W. (2d) 912, (1936)

(Plaintiff slipped on floor that had been mopped in mid-day with water containing "Climalene" which made the water very slippery. Water and climalene still on the floor and plaintiff continued to slip after the fall and when she tried to get up.)

Ten Ball Novelty and Manufacturing Co. -vs- Allen, 255 Ala. 418, 51 So. (2d) 690 (1951)

(Real heavy coat of wax applied in initial treatment of new floor and floor made "real slick" and then the floor was negligently cluttered with excelsior shreds. Court said at page 693: "The slick condition of the floor and the presence of paper on the floor was sufficient to present a jury question as to whether defendants exercised reasonable care to have the floor in a reasonably safe condition.")

Shipp -vs- 32nd St. Corp., 30 N.J.L. 518, 33A. (2d) 852 (1943)

(Examples there of other slips on the floor and of the dangerously slippery condition having been called to manager's attention considerably before occurrence of accident in question.)

The plaintiff also cites the case of *Gill -vs- Meir and Frank Co.,* 208 Ore. 536, 303 Pac. (2d) 211 (1956); however, it quite apparently is a mis-citation by her, for the plaintiff was there non-suited and the non-suit affirmed. As to the latest expression of the Oregon rule appellant respectfully cites to court and counsel the case of De La Croix -vs- Sanders, ...Ore....., 347 P. (2d) 966 (1959) which is an unexplained fall on a waxed floor case precisely in point and against plaintiff's contentions here and wholly consonant with the majority rule across the country upon which appellant relies.

Taylor -vs- Northern States Power Co., 196 Minn. 22, 264 N.W. 139 (1935)

(The floor was described as being "like grease" and had excessive water upon it and against which the use of rubber matting or rugs would have protected.)

O'Conner -vs- J. C. Penney Co., 211 Minn. 602, 2 N.W. (2d) 419 (1942)

(Proof adduced of an accumulation of dirty, greasy-looking substance on the floor where the plaintiff slipped and which stuck to her hands as she got up. Her foot left a foot long streak where it slid. It was shown that the plaintiff hadn't followed the manufacturer's directions in applying the floor dressing.)

Gray -vs- Fitzgerald and Platt, 144 Conn. 57, 127 A. (2d) 76 (1956)

(Not possible to tell what happened. No facts are

given other than that the floor was so dangerously slippery that the plaintiff's son could slide or apparently skate on it.)

Charles -vs- Commonwealth Motors, 195 Va. 576, 79 S.E. (2d) 594 (1954)

Plaintiff slipped on a *sloping*, terrazza ramp that was described as "very slippery" and "very slick".)

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f) The Verdict Is Excessive Because it Includes Amounts For Items of Claimed Damage For Which No Evidence Was Produced and Amounts in Excess of What Was Pleaded.

It should be carefully noted that the ground upon which the appellant challenges the excessiveness of the verdict is: Measured by the criterion of State Court cases, the evidence is insufficient to sustain the verdict as a *matter of state* law. Appellee at no point in her brief recognizes this is the issue presented for review, and has made no substantive attack thereon. The question is not one of instructions but of the sufficiency of the evidence as measured by appropriate state law. The propostion has been unequivocally stated that a Federal Court in weighing the sufficiency of the evidence is bound by the application of state law.

Lovas -vs- General Motors Corp., (CA Ohio 1954) 212 F. (2d) 805 at 807;

Hopkins -vs- E. I. Du Pont De Nemours & Co., (CA Pa. 1952) 199 F. (2d) 930, at 932, 933.

In every case before an issue is submitted to a jury, or when a particular question is certified up on appeal, the Court must ask itself whether there is sufficient evi-

dence under appropriate state decisions upon which the issue may be submitted to the jury or upon which the verdict may be sustained. The QUANTUM of evidence and SUFFICIENCY thereof are questions of law—not fact; the scales to weigh the quantum and sufficiency of the evidence in a diversity-of-citizenship case are supplied by state substantive law. If under controlling state law the evidence is insufficient to sustain the verdict as a matter of law then the Federal Court is bound to decide in conformity with the state law.

Lovas -vs- General Motors Corp., supra, 212 F. (2d) at 807.

It has been settled beyond dispute that a Federal Court may reverse a judgment and grant a new trial upon the grounds of insufficiency of the evidence to sustain the amount of the verdict without subverting the provisions of the Seventh Amendment.

Kennon -vs- Gilmer, 131 U.S. 22, 29; 33 L.E. 110, 9 S. Ct. 696 (1888, D.C. Mont.);

Complete Auto Transit Co. -vs- Floyd, (CA 5th, 1958) 249 F. (2d) 396, 399.

To determine, therefore, whether the evidence is sufficient to sustain the verdict as a *matter of law,* the federal court must look to state court decisions for the answer. We have supplied in our opening brief at pages 61 and 62 appropriate state court decisions which make it clear that in the instant case there is insufficient evidence to support that portion of the verdict which must be attributed to loss of future earnings or earning capacity. To sustain the verdict one must either allocate $20,851.50 to unproved future loss of earnings or allow more than $10,000 to general damages contrary to the amount

specifically limited by the pleadings. Appellee makes no reference to these cases other than attempting to distinguish the *Chenoweth* case. In addition to the cases already cited we wish to draw the court's attention to the following Montana decisions holding that in each instance there was insufficient evidence to sustain the amount of the verdict:

> *Mueller -vs- Todd*, 117 Mont. 80, 158 Pac. (2d) 299 (1945);
>
> *Jewett -vs- Gleason*, 104 Mont. 63, 70-74, 65 Pac. (2d) 3, (1936);
>
> *Cline -vs- Tait*, 113 Mont. 475, 129 Pac. (2d) 89 (1942) (Medical expenses only $600.00);
>
> *Ashley -vs- Safeway Stores, Inc.*, 100 Mont. 312, 331, 47 Pac. (2d) 153 (1935) (Scaled verdict of $20,000.00 to $10,000.00).

Damages of course are for compensatory relief and must find their support in the evidence! When there is clearly no evidence to support the amount of a verdict, there is no longer involved a question of fact, but one of law which must be answered by looking to appropriate state court decisions.

> *Lovas -vs- General Motors Corp.*, supra, 212 F. (2d) at 807.

We submit that to sustain the amount of the verdict in the instant case would be tantamount to ignoring the substantive state law on the subject, and would be entering into the realm of speculation and caprice which has been whole-heartedly condemned by the Montana Supreme Court.

> *Everett -vs- Hines*, 64 Mont. 244, 262, 298 Pac. 1063, 1068, 1069 (1922).

CONCLUSION

Appellant respectfully submits that the respondent has not met appellant's specifications of error or distinguished or otherwise ruled out its authorities in support thereof, and that the same are meritorious and should result in this court's ordering the judgment reversed and judgment, n.o.v. entered for the defendant, or alternatively a new trial ordered.

Respectfully submitted,

JAMES A. POORE, JR.
ROBERT A. POORE
URBAN L. ROTH
By: ROBERT A. POORE
Attorneys for Appellant

Service of the foregoing brief admitted and three copies thereof acknowledged this 16th day of March, 1960.

/s/ Leif Erickson
Attorney for Plaintiff

EXHIBIT "A"

(TRANSCRIPT OF PORTION OF PLAINTIFF'S ORAL ARGUMENT IN OPPOSITION TO DEFENDANT'S MOTION FOR DIRECTED VERDICT.)

"MR. ERICKSON: Now, that is all I have to offer on the main point, except on the res ipsa doctrine, and I realize I am carrying the laboring oar there. However, counsel has cited an impressive array of cases, but they represent, as I recall it, about five states on the res ipsa—I may be wrong on that.

COURT: Well, the case you cite, the hospital case from California, the case itself isn't of any assistance to the Court, except as it announces Prosser's rule, I suppose, and whether or not, accepting that rule, you can establish that this is a proper case to come under that rule?

MR. ERICKSON: That's right, and I may say that the way the law is built, as the Court well knows, is for a judge to submit that the general principle applies to the facts in a given case, and apply it, and I cannot see any difference between a slip and fall case and any other, if you have the facts, and I think we have the facts. My purpose in examining the manager was to establish that people usually don't fall in his store, and that, of course, is one of first conditions of the doctrine of res ipsa, that it isn't the type of situation where you expect falls to occur, and that's established very clearly. Now, how clearly it is established in the other cases, I don't know. And then the second, of course, is that the instrumentality is under the control of whoever is sought to be charged. Certainly, that is true here; and then the third require-

ment, that the knowledge, the information is peculiarly available to the one that is sought to be charged, and the rule as stated in the Mason case and the Ybarra case and any number of cases is that you can't lay down a fixed rule. Now, it is true that they have not applied it in slip and fall cases, that is generally. We don't know what cases have not been appealed in which it may have been applied, but that makes no difference. *It seems to me that this is so clearly a case where the doctrine of res ipsa applies that the cases cited by counsel are not controlling,* and if every jurisdiction in the United States had applied the rule, I still don't think your Honor would be bound by it because if it is a case where the principle of res ipsa applies, it ought to be applied, and I think the logic of it, the rationale of it, actually they do apply it. If you look at these cases that I have cited, and the cases cited by counsel, there is a lot of skirting around the bush about whether there is any inference of negligence and a lot of what it takes to establish the case, and I think in Chase versus Perry they obviously applied the doctrine of res ipsa, and I think they did it in the Manning case, and any number of these cases, and while the Court is skirting around saying res ipsa, *they actually have applied it, and for that reason I think the doctrine does apply.* I seem to be short one authority in addition to the Ybarra case that I penciled in.

COURT: You penciled it in on the memorandum you gave me.

MR. ERICKSON: I don't seem to have a copy of that memorandum.

COURT: I forget the case now, but I read it at the time.

MR. ERICKSON: That was a case where—it was a slip and fall case, and I have penciled it in on your copy.

MR. POORE: I can tell you about the case. It was tried to the Court alone?

MR. ERICKSON: Yes.

MR. POORE: And it was specifically held that res ipsa was not applicable.

MR. ERICKSON: That was not the specific holding in that case.

MR. POORE: We apparently differ.

MR. ERICKSON: In that case there was a discussion about res ipsa and the Court did not apply it, but the Court did not reject the doctrine. It in effect, in my opinion, by way of dictum said res ipsa does apply in slip and fall cases.

That's the only case I have that points in that direction, your Honor. I'll rest my argument on res ipsa—

COURT: On the principle of the rule announced by Prosser. Is there anything else you want to just shoot at me?

MR. POORE: I'll make it very brief, your Honor. In the first place, if there is any hornbook type of law, when you have a 1959 annotation 90 some pages long on slippery floors and directed at wax and oil cases, and the res ipsa loquitur doctrine is summarized as follows, 'It is universally held that the res ipsa loquitur doctrine is inapplicable in suits to recover against business proprietors for injuries sustained in falls on waxed, oiled, or similarly treated floors within the business premises'."